PUNJ LLOYD SDN BHD v. RAMO INDUSTRIES SDN BHD & ANOR AND ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG J
[ORIGINATING SUMMONS NO: WA-24C-137-07-2018
& WA-24C-155-07-2018]
28 FEBRUARY 2019

CONSTRUCTION LAW: *Adjudication – Setting aside – Application to set aside adjudication decision – Dispute arising from payment claim – Joint venture partners appointed joint venture company to carry out construction works – Appointment made through purchase order – Whether purchase order constituted subcontract – Contracting parties to subcontract – Whether both joint venture partners parties to subcontract – Whether adjudicator had jurisdiction to hear and decide on dispute brought for adjudication – Whether adjudication decision ought to be set aside – Construction Industry Payment and Adjudication Act 2012, s. 15(d)*

CONSTRUCTION LAW: *Adjudication – Enforcement of adjudication decision – Joint venture partners appointed joint venture company to carry out construction works – Dispute over payment sum under payment claim – Joint venture company commenced adjudication against joint venture partners – Whether there was subcontract between joint venture company and both joint venture partners – Whether one joint venture partner discharged from all obligations to pay joint venture company – Whether one joint venture partner could be estopped from denying that it was party to subcontract – Whether adjudicator had jurisdiction to decide dispute – Whether adjudication decision ought to be enforced – Construction Industry Payment and Adjudication Act 2012, s. 15(d) – Contracts Act 1950, s. 42*

CONTRACT: *Subcontract – Parties – Joint venture partners appointed joint venture company to carry out construction works – Appointment made through purchase order – Whether there was written contract/subcontract – Whether purchase order constituted subcontract – Contracting parties to subcontract – Whether both joint venture partners parties to subcontract*

Punj Lloyd Sdn Bhd ('PLSB') and its joint venture partner, Punj Lloyd Ltd ('PLL'), were appointed by PRPC Refinery and Cracker Sdn Bhd to carry out a refinery and petrochemical project ('the project'). By way of a purchase order ('PO') dated 14 September 2015 ('14 September PO'), PLSB appointed a joint venture company, comprising Ramo Industries Sdn Bhd and Ramo Industries Pte Ltd ('Ramo's JV'), to carry out construction works ('the works'). PLL issued another PO which was not accepted by Ramo's JV as it did not set out the payment terms. In an email to Ramo's JV, PLL stated that, *inter alia*, (i) the other POs were issued to regulate payment from PLL; and (ii) the 14 September PO was valid and the contract would be governed by it. PLL issued a PO dated 1 December 2015 ('1 December PO') for the

works and this PO provided that the date of commencement of the works was 2 October 2015 and the completion date was 1 June 2016. PLL later informed Ramo's JV that the 1 December PO would be short closed for the value of works done and that Ramo's JV would be issued an award for the balance scope of works that remained unexecuted under the 1 December PO. Following this, PLL issued another PO to Ramo's JV, for the remaining works, which provided that the completion date remained on 1 June 2016 despite the purchase order being issued only on 2 September 2016, which was after the expiry of the completion date. Pursuant to the terms of the contract, Ramo's JV carried out the works and served on PLSB, a payment claim in the amount of USD8,590,875.95. In its payment response, PLSB denied Ramo's JV's payment claim. This prompted Ramo's JV to commence an adjudication proceedings against PLSB. In its adjudication response, PLSB stated that any sums payable to Ramo's JV were to be set off against damages and liquidated damages amount of USD2,072,565.71 and USD3,607,997.39 payable by Ramo's JV to PLSB. Ramo's JV obtained the corrective adjudication decision in its favour ('adjudication decision'). Hence, the present applications by (i) PLSB to set aside the adjudication decision, under s. 15(d) of the Construction Industry Payment and Adjudication Act 2012, on the ground that the adjudicator had no jurisdiction to adjudicate the dispute because there was no contract between PLSB and Ramo's JV as the contract was between PLL and the Ramo's JV. Alternatively, PLSB applied for a stay of the adjudication decision pending the outcome of a continuing arbitration in India between PLL and Ramo's JV; and (ii) Ramo's JV to enforce the adjudication decision. The issues that arose for adjudication were (i) whether the contract was between PLSB and Ramo's JV and, as such, whether the adjudicator had jurisdiction to decide on the dispute; (ii) whether PLSB was estopped from denying that the contract was between them and Ramo's JV; (iii) whether PLSB could, in setting aside the adjudication decision, raise a new argument that Ramo's JV agreed that PLL would be liable for payments and that PLSB would be discharged from all obligations to pay Ramo's JV under s. 42 of the Contracts Act 1950 ('the CA'); (iv) whether the adjudication was in respect to one contract or two separate contracts; and (v) whether there should be a stay of the adjudication decision pending disposal of the arbitration commenced in India.

Held (ordering accordingly):

(1) The adjudicator had more than sufficient basis, for the purpose of the adjudication, to proceed on the basis that the contract was between PLSB and Ramo's JV, the material document being the 'base order', which was the 14 September PO, and the intention of the parties had not been varied by any express written documents or, by definitive conduct

of abandoning the 'base order' or substituting it with subsequent POs which were all issued for the limited purpose of regulating payment. The payment arrangement did not, itself, negate the very base subcontract under the 14 September PO which was issued by PLSB to Ramo's JV. Therefore, the adjudicator had the jurisdiction to hear the dispute as the parties before him were the parties to the construction contract in writing. (paras 59 & 61)

(2) PLSB was estopped from arguing that they were not a party to the contract. PLSB is a joint venture of PLL and, as joint ventures, it was not uncommon for them to be jointly and severally liable for the projects they have undertaken. The conduct of PLSB and PLL were such that, where money matters were concerned, they seemed to be able to sort it out between themselves. Furthermore, PLSB had claimed for liquidated damages against Ramo's JV in their adjudication response. It begged the question as to how PLSB could claim for liquidated damages against Ramo's JV if not for the fact that PLSB had always acted consistent with their stand that they were the contracting party with Ramo's JV and that the payment from PLL was their own internal arrangements with respect to regulating payments only. (paras 66, 67, 73 & 77)

(3) At most, there was only an arrangement for payment or what was termed as 'regulating payment' and the contract remained very much one between Ramo's JV and PLSB and PLSB had not been discharged from their liability to pay. Mere payment from PLL did not excuse or absolve PLSB from payment under the contract. It was very much like a situation where the payment had come from the employer of the project direct to Ramo's JV, as subcontractors, bypassing PLSB, the contractor. If PLL did not pay, the claimants could still look to PLSB to pay as their contractual commitment remained intact. For s. 42 of the CA to apply, there must be actual performance of a third party of the promisor's obligation. If the third party had not fully performed the promisor's obligation, the promisee is not barred from pursuing against the promisor merely because the third party had partially performed the obligation of the promisor, in the absence of clear evidence that the promisee intends to discharge the promisor totally and look to the third party exclusively for the discharge of the promisor's obligation to pay for works done for the benefit of the promisor under the contract. There was no room for the application of s. 42 of the CA discharging PLSB from their obligation to pay under the contract. In any event, PLSB could not now canvass a new argument not taken up at the adjudication and, more so, when it was a matter that would need the underpinning of facts to be found by the adjudicator. (paras 98, 99, 102 & 103)

(4) The binding contract between the parties was the 14 September PO. The subsequent POs were issued by PLL for the same and similar works, as mentioned in the 14 September PO. These POs were issued to regulate payment. Very significantly, the contract amount mentioned in the subsequent POs issued by PLL was the same as the contract sum mentioned in the 14 September PO issued by PLSB. The valid and governing subcontract was the 14 September PO issued by PLSB. Since the subsequent POs issued by PLL were for the same and similar works, as mentioned in the 14 September PO, it stood to reason that it should be taken to constitute a singular agreement, as in a unified contract, between the parties. There were no two different contracts with two different parties, as alleged by PLSB. (paras 111, 113 & 114)

(5) There was nothing preventing PLSB from commencing a civil suit against Ramo's JV for a declaration that the contract in question was one between PLL and Ramo's JV, and not between PLSB and Ramo's JV. However, Ramo's JV may prefer to wait for the conclusion of the arbitration in India before commencing the civil suit to avoid two different tribunals coming to two different decisions. There was nothing preventing the court from ordering a conditional stay subject to terms. The conditions were (i) half of the whole adjudicated amount, inclusive of interest, fees, costs and expenses that had been ordered in the adjudication decision be paid to Ramo's JV direct against Ramo's JV undertaking to pay the respondent back in the event that the arbitral award in India requires this sum paid to the claimants to be repaid back to PLSB/PLL or so much of it; (ii) this undertaking shall carry a committal penal clause setting out the names of all the directors of Ramo's JV and the above-mentioned sum shall be paid within three weeks from the date of this order; and (iii) the balance 50% sum shall be paid to PLSB's solicitors within three weeks of this order as stakeholders pending the outcome of the arbitral award in India. (paras 127, 128 & 132)

Case(s) referred to:

Abacus Funds Management Ltd v. Davenport [2003] NSWSC 935 ***(refd)***
Air Design (Kent) Ltd v. Deerglen (Jersey) Ltd [2008] EWHC 3047 ***(refd)***
BRB Modular Pty Ltd v. AWX Constructions Pty Ltd & Ors [2015] QSC 222 ***(refd)***
Chinn Swee Onn v. Puchong Realty Sdn Bhd [1990] 1 CLJ 28; [1990] 1 CLJ (Rep) 44 SC ***(refd)***
Dacy Building Services Ltd v. IDM Properties LLP [2016] 170 Con LR 176 ***(refd)***
Fifty Property Investments v. Barry J O'Mara & Anor [2006] NSWSC 428 ***(refd)***
Filadelfia Projects Pty Ltd v. Entirity Business Services Pty Ltd [2010] NSWSC 473 ***(refd)***
Grovedeck Limited v. Capital Demolition Limited [2000] BLR 181 ***(refd)***
Hj Nik Ishak Hj Nik Daud v. Nik Zainab Nik Jaafar [1975] 1 LNS 53 FC ***(refd)***
Hauslab Design & Build v. Vinod Kumar Ramgopal [2016] SGHC 222 ***(refd)***
John Mowlem & Co Plc v. Hydra-Tight & Co Plc [2000] Lexis Citation 1299 ***(refd)***
Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Mohamed Ismail Mohamed Shariff v. Zain Azahari Zainal Abidin & Ors [2013] 2 CLJ 717 FC ***(refd)***
Mohd Bakri Ishak v. Universiti Utara Malaysia [2015] 1 LNS 177 CA ***(refd)***
Pegram Shopfitters Ltd v. Tally Weijl (UK) Ltd [2003] EWCA Civ 1750 ***(refd)***
Scott & English (Malaysia) Sdn Bhd v. Foo Thor Lombong Bijih Sdn Bhd & Anor [1984] 1 LNS 61 HC ***(refd)***
Transmission Technology Sdn Bhd v. PESB Engineering Sdn Bhd & Another Case [2018] 7 CLJ 516 HC ***(refd)***
TYL Land and Development Sdn Bhd v. SIS Integrated Sdn Bhd & Another Case [2018] 1 LNS 145 HC ***(refd)***
View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2019] 5 CLJ 479 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 42
Construction Industry Payment and Adjudication Act 2012, ss. 2, 5(1), 13(c), 15(d), 16(1)(b), (2), 27(3)

(Originating Summons No: WA-24C-137-07-2018)
For the plaintiff - Jack Yow Pit Pin & Kwong Chiew Ee; M/s Rahmat Lim & Partners
For the defendants - Sanjay Mohan Mohanasundaram & K Gobinath; M/s Mohanadass Partnership

(Originating Summons No: WA-24C-155-07-2018)
For the plaintiffs - Sanjay Mohan Mohanasundaram & K Gobinath; M/s Mohanadass Partnership
For the defendant - Jack Yow Pit Pin & Kwong Chiew Ee; M/s Rahmat Lim & Partners

Reported by Najib Tamby

JUDGMENT

Lee Swee Seng J:

[1] There were two originating summonses that were directed to be heard together, as is so often the case where one is for setting aside an adjudication decision and another is for enforcement of the adjudication decision. There was also a separate prayer made within the setting aside originating summons to stay the adjudication decision pending the conclusion of an arbitration involving the same subject matter of the dispute in India.

Parties

[2] The parties must now be introduced. Punj Lloyd Sdn Bhd ("PLSB") had applied as the plaintiff to set aside the adjudication decision made against them as respondent in an adjudication under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"). The defendants as the claimants in the adjudication were Ramo Industries Sdn Bhd ("RISB"), a Malaysian company and Ramo Industries Pte Ltd ("RIPL"), a Singapore company, which had formed an unincorporated joint venture ("Ramo's JV) to carry out the construction contract awarded to them by PLSB.

[3] This fact, as found by the adjudicator, was vigorously disputed by PLSB which had maintained at the adjudication and before this court that the contract was between their joint venture partner Punj Lloyd Limited ("PLL"), incorporated in India with the Ramo's JV. PLL is the holding company of PLSB.

[4] PLSB had also alternatively applied for a stay of the adjudication decision pending the outcome of a continuing arbitration in India between PLL and the Ramo's JV. Though PLSB is not a party to that arbitration, they nevertheless maintained that their *locus* to apply for stay of the adjudication decision is by virtue of the fact that the subject matter of the adjudication is now the same subject matter of the arbitration in India and so pending final determination by arbitration, thus fulfilling the threshold condition set out in s. 16(1)(b) of the CIPAA.

[5] The Ramo's JV as the successful claimants in the adjudication had applied to enforce the adjudication decision or more particularly the corrective adjudication decision dated 2 July 2018 against PLSB.

[6] Needless to say with respect to PLSB's stay application, the Ramo's JV is objecting to it.

[7] For the avoidance of confusion as to the identity of the parties in this judgment, the parties to these two originating summonses shall be referred to by their acronyms as PLSB and the Ramo's JV or sometimes as the respondent and the claimants respectively as they were so referred to in the adjudication.

Project

[8] PLSB together with its joint venture partner, PLL, were appointed by PRPC Refinery and Cracker Sdn Bhd to carry out work known as Engineering, Procurement, Construction and Commissioning of the RAPID Tank Farm for the Refinery and Petrochemicals Integrated Development (RAPID) Project in Pengerang, Kota Tinggi District, Johor ("the project").

[9] By a purchase order dated 14 September 2015 (SBMY01/38) ("the PO dated 14 September 2015"), PLSB appointed the Ramo's JV as the contractors for the work knows as "Construction of Pre-Engineered Structure and Pre-Fabricated Building for Accommodation Camp-RAPID PROJECT" for original contract sum of USD19,387,400 ("the works").

[10] As narrated by learned counsel for the Ramo's JV, this accommodation camp was to house the workers, supervisors and managers who were involved in what is commonly known as the RAPID Project which is a refinery and petrochemical project. These accommodation camps are to be built for package 22 of the RAPID Project. Pursuant to the PO dated

14 September 2015, the Ramo's JV were to commence the works on 2 October 2015. The completion period was eight months from 2 October 2015 to 1 June 2016.

Problem

[11] Then came the contentious document, which is the watershed of this case. Shortly after the issuance of the PO dated 14 September 2015, the joint venture partner of PLSB ie, PLL, issued another purchase order dated 6 November 2015 (PTIN17/411224) ("the PO dated 6 November 2015"). However, the PO dated 6 November 2015 was not accepted by the Ramo's JV as the same did not set out the payment terms as agreed between the parties.

[12] PLSB's joint venture company, PLL, thereafter issued an e-mail dated 1 December 2015 to the Ramo's JV to confirm and clarify, if not to comfort them, stating that there was going to be further purchase order being issued but it was made clear that this purchase order was being issued for "the purposes of regulating payment" from PLSB's joint venture partner, PLL. In this e-mail, it was made clear that the PO dated 14 September 2015 (SBMY01/38) was still valid and the contract will be governed and operated by the PO dated 14 September 2015 and that the purchase orders to be issued by PLSB's joint venture partner are being used for "the purposes of regulating payment".

[13] PLL issued a purchase order dated 1 December 2015 (PTIN17/411824) ("the PO dated 1 December 2015") for the same works. This PO provides that the date of commencement of the works was 2 October 2015 and that the completion date remains on 1 June 2016; thus the works and completion period remained unchanged.

[14] Thereafter, the joint venture partner of the PLSB, PLL, issued a letter dated 30 August 2016 informing the Ramo's JV that the PO dated 1 December 2015 (PTIN17/411824) will be short closed for the value of works done until 30 August 2016 and that the Ramo's JV would be issued an award for the balance scope of works that remained unexecuted under the PO dated 1 December 2015 (PTIN17/411824).

[15] Then, PLL issued a purchase order dated 2 September 2016 (PTIN17/420694) ("the PO dated 2 September 2016") to the Ramo's JV for the remaining works. Learned counsel for the claimants said the PO dated 2 September 2016 as described above was used to regulate the payment and it was never the intention of parties for the PO dated 14 September 2015 (SBMY01/38) to be superseded.

[16] The PO dated 2 September 2016 (PTIN17/420694) provided that the completion date remained on 1 June 2016. This was despite that the purchase order was issued only on 2 September 2016 ie, after the expiry of the completion date.

[17] Pursuant to the terms of the contract, the Ramo's JV carried out the works and submitted their claims. However, a dispute arose in respect of the Ramo's JV's claims for the sum of USD8,590,875.95. PLSB refused to pay the claimant, Ramo's JV.

Proceedings In Adjudication

[18] On 2 January 2018, the Ramo's JV served a payment claim under the CIPAA for the sum of USD8,590,875.95 on PLSB. The payment claim comprises the following:

(a) Progress claim dated 23 August 2017, in the sum of USD7,389,201.71;

(b) Retention sum for Phase 1, in the sum of USD609,666.67; and

(c) Retention sum for Phase 2, in the sum of USD592,007.57.

[19] PLSB then served their payment response on 11 January 2018 denying the whole of the payment claim and asserting that the adjudicator had no jurisdiction as the contracting party is not PLSB but PLL.

[20] The Ramo's JV then commenced the adjudication proceedings by issuing notice of adjudication on 23 January 2018 to PLSB. An adjudicator was appointed and the parties proceeded with clockwork precision in the service of the adjudication claim, adjudication response and adjudication reply.

[21] It is pertinent to point out that in the adjudication response, PLSB as the respondent had stated that any sums payable to the claimants Ramo's JV are to be set-off against damages and liquidated damages amounts of USD2,072,565.71 and USD3,607,997.39 payable by the claimants to the respondent and had set out substantially the merits of their claim.

[22] The claimants obtained the corrective adjudication decision on 2 July 2018 in their favour against PLSB as follows:

> 16.0 ADJUDICATION DECISION
>
> 16.1. ...
>
> (a) The Respondent shall pay to the Claimants the sum of USD1,019,289.86 in respect of the unpaid balance amount for the work done under the original scope of the works and for the variation works carried out by the Claimants;
>
> (b) The Respondent shall pay to the Claimants the sum of USD59,432.12 in respect of the GST;
>
> (c) The Respondent shall pay to the Claimants the sum of USD609,666.67 and USD592,007.57 for the retention sums in respect of Phase 1 and Phase 2 respectively;
>
> (d) The Respondent shall pay to the Claimants interest on the amounts awarded in sub-paragraphs 16.1(a)-(c) herein at the rate of 5% per annum from 2.1.2018 until the date of full settlement;

(e) The Respondent shall pay to the Claimants party to party costs in the amount of RM50,000.00;

(f) That the Respondent shall reimburse the Claimants all the sums paid by the Claimants to the AIAC, including the registration fee, appointment fees and the Advance Security Deposit for the AIAC's expenses and administrative fees, and the adjudicator's fees in connection with this adjudication;

(g) The adjudicator's fees and expenses in this adjudication is to be borne by the Respondent;

(h) The amounts as set out in sub-paragraphs 16.1 (a)-(f) herein shall be paid by the Respondent to the Claimants within fourteen (14) days from the date of this Corrective Adjudication Decision, by way of Banker's Cheque or in any other manner agreeable by the Claimants.

Prayers

[23] PLSB, being dissatisfied with the adjudication decision, filed the application on 13 July 2018 to set aside the adjudication decision under s. 15(d) of the CIPAA (WA-24C-137-07-2018). The main plank of the challenge made is that there was no contract between PLSB and the Ramo's JV but the contract was instead between PLL and the Ramo's JV and hence the adjudicator had no jurisdiction to adjudicate the dispute with the result that he had exceeded his jurisdiction in proceeding to decide on the dispute and in delivering his adjudication decision.

[24] PLSB further filed their notice of application in encl. 8 dated 17 July 2018 within the setting aside originating summons for a stay of the adjudication decision under s. 16 of the CIPAA on the ground that the threshold condition had already been met in that PLL had commenced arbitration against the Ramo's JV in India. More importantly, they submitted that there was a clear and unequivocal error on the part of the adjudicator and that the justice of the case demands it.

[25] They also argued that though PLSB is not a party to the arbitration in India, PLSB nevertheless can activate s. 16(1)(b) of the CIPAA as the threshold condition had been met in that the subject matter of the dispute is now in the arbitration that PLL had commenced.

[26] Ramo's JV filed their application to enforce the adjudication decision on 30 July 2018 (WA-24C-155-07-2018) and both matters were called to be heard together.

Principles

[27] When a jurisdictional challenge was raised before the adjudicator, as it was in this case, the adjudicator need not have to wrestle with the issue nor be rattled by it. He may proceed under s. 27(3) of the CIPAA which reads:

A (3) Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1).

B **[28]** The adjudicator was fully conscious of this and acknowledged that he had not been conferred with the jurisdiction by the parties to decide on his own jurisdiction finally and conclusively. He proceeded to render his non-binding reasons and observations for finding that the contract in question was with the right party PLSB and not as contended by PLSB that the contracting party is PLL.

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[29] The adjudicator further addressed the issue as to whether there were two separate contracts – one between PLL and the first claimant RISB and the other between PLL and the second claimant RIPL. PLSB had taken the stand that there can only be one adjudication for one contract and not for two contracts.

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Whether The Contract In Question Was Between PLSB And The Ramo's JV And As Such The Adjudicator Had Jurisdiction To Decide The Dispute

[30] It goes without saying that if there is no construction contract in writing between the claimants Ramo's JV and PLSB, then under the CIPAA there can be no reference of the dispute to adjudication. See s. 2 of the CIPAA on the application of the Act. It can be argued that to assume jurisdiction when there is none would be to act in excess of jurisdiction and so the adjudication decision is liable to be set aside under s. 15(d) of the CIPAA.

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[31] If there is no such contract, then naturally the adjudicator would have no jurisdiction to adjudicate the matter. This appears to be a case of contingent jurisdiction as the answer hinges on the question as to whether PLSB had entered into the contract with the Ramo's JV. Ordinarily, the contract is a construction contract over which the issue of core jurisdiction is not in question.

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[32] Being a contingent jurisdiction matter, this court is at liberty to look at the issue of jurisdiction afresh and satisfy itself that there is indeed a contract between Ramo's JV and PLSB at least for the purpose of the adjudication.

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[33] In the case of *TYL Land and Development Sdn Bhd v. SIS Integrated Sdn Bhd & Another Case* [2018] 1 LNS 145; [2018] 2 MLRH 699, 726; [2018] MLJU 217 it was held as follows:

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> [111] When raised at the stage of the setting aside application, the court is not bound by the finding of the adjudicator as to whether he had or does not have jurisdiction. The court must look at the matter afresh irrespective of itself that indeed the adjudicator had jurisdiction. In other words, the court is unfettered by the previous decision or non-decision of the adjudicator when a jurisdictional challenge is raised.

[34] Clearly, to determine this, the court would have to look at the relevant facts. Whilst the court is not bound by the findings of facts of the adjudicator, this court would nevertheless apply its own assessment to the facts as found by the adjudicator and see if it has any cogent reason to disagree with the adjudicator and also consider if the adjudicator's findings are reasonably supported by the documents and the legal arguments advanced.

[35] In other words, where the issue of contingent jurisdiction would rely on facts as found by the adjudicator, this court conscious of its free spirit to decide unfettered by the finding of facts of adjudicator where a determination of the issue of contingent jurisdiction is concerned, would nevertheless exercise some restraint in disturbing the finding of facts unless the finding is totally unsupported by the evidence before the adjudicator.

[36] Such an approach is consistent with the case of New South Wales Supreme Court case of *Fifty Property Investments v. Barry J O'Mara & Anor* [2006] NSWSC 428, at para [21] where it was also held as follows:

> [21] Where the *existence of an essential preliminary precondition to jurisdiction is a question of objective fact* (as distinct from where it depends on the tribunal having a state of satisfaction or opinion), *it is for the reviewing court to determine, on the evidence before it, whether or not the fact exists, and evidence of the existence or non-existence of the fact is admissible in the reviewing court* [*R v. Blakeley*, 91-92; *R v. Ludeke; Ex parte Queensland Electricity Commission* (1985) 159 CLR 178 at 183-184; *DMW v. CGW* (1982) 151 CLR 491 at 510; *Timbarra Protection Coalition Inc v. Ross Mining NL*], *although courts exercise some restraint in interfering with findings with respect to the jurisdictional fact and do so only if satisfied that the decision maker's finding of the jurisdictional fact is wrong* [*Parisienne Basket Shoes Pty Ltd v. Whyte Queensland v. Wyvill* (1989) 25 FCR 512; 90 ALR 611 at 618, (Pincus J)). (emphasis added)

[37] See also the Singapore case of *Hauslab Design & Build v. Vinod Kumar Ramgopal* [2016] SGHC 222.

[38] Holding the above approach in a dynamic balance, this court whilst revisiting the findings of facts by the adjudicator as they relate to the issue of contingent jurisdiction would nevertheless exercise some restraint where disturbing such findings are concerned unless such findings are totally unsupported by the evidence before the adjudicator.

[39] The first legal document of prime importance must surely be the PO dated 14 September 2015 which had been relied on by the claimants as constituting the construction contract. It was unmistakably issued by PLSB to a party named as "Ramo JV" and upon closer scrutiny of the "Notes to Supplier" the adjudicator was left in no doubt that "Ramo JV" referred to the first claimant and the second claimant.

[40] Then, PLL issued another PO dated 1 December 2015 for the same subject works to the second claimant accompanied by an e-mail also from PLL. The immediate question would be why another PO on the same works. The first paragraph of the email anticipated this query and immediately clarified and confirmed as follows:

> 1.Present Order (attached) is just to **regulate the immediate payment from PLL.** (emphasis added)

[41] As if to allay the claimants' fears that anything might be amiss, PLL in para. 2 of the "Notes to Supplier" declared as follows:

> This Agreement is being issued to Ramo Industries Pte Ltd only for **regulation of payment.** (emphasis added)

[42] The claimants were not going to be fastidious about it and went with the flow so long as the terms of the contract contained in the PO dated 14 September 2015 were the same.

[43] We were all not born yesterday and sometimes certain expressions are kept brief and even deliberately vague for a designed purpose of the party that had used such a euphemistic expression!

[44] By no means am I suggesting anything sinister for no one is saying that such an expression had the effect of defrauding the authorities whether in India, Singapore or Malaysia and no evidence has been led on that and indeed no submission made on that.

[45] The expression "regulation of payment" can well be for internal consumption for accounting purpose where payments from a joint venture partner (PLL) of a contracting party (PLSB) might well require certain presenting documents whether it be for the eyes only of the regulators or otherwise.

[46] Whatever might be its ultimate objective, it is none of the claimants' business to poke their nose into it, to put it colloquially but politely, and the claimants understood it as such. They had no clue that it was later to prove to be a contentious issue for the words employed in the same email in paras. 2 and 3 were clear as reproduced below:

> 2. Earlier, an order was issued from PLL (bearing no. PTIN17/411224 dated 6/11/2015) was issued on RAMO's JV to regulate payment. This Order is now cancelled and no more valid.

3. **The initial order issued from PLSB (bearing no. SBMY01/38) is valid and Subcontract shall be governed by this order.** So, this is the **base order.** We shall refer this order to operate Subcontract of said work. (emphasis added)

[47] I agree with the adjudicator that the two references to "this order" in para. 3 above must necessarily mean the PO dated 14 September 2015 and not to the PO dated 1 December 2015.

[48] As further support for this stand taken, the adjudicator discerned that the writer of the email had a certain pattern in his writing as can be seen in para. 2 of the email when the same expression "this order" was used to refer in the same paragraph to an earlier PO dated 6 November 2015 which "is now cancelled and no more valid."

[49] I have no valid reason to disagree with the adjudicator's reasoning and rationale.

[50] Granted that PLSB and PLL may have their own ultimate purpose to be served by such a PO which can only be beneficial to them, the claimants were not going to create a fuss or be fixated to form for so long as the works contracted for was the same where scope of the works and pricing were along the same terms. The "MATERIAL DESCRIPTION/ DELIVERY/QTY" were all the same for the 23 items as is the contract price save for the GST 6% which was absent.

[51] The claimants immediately replied to the email dated 1 December 2015 the very next day in their email dated 2 December 2015 which is consistent with the position taken by the claimants that the contract has to be with PLSB. This email dated 2 December 2015 showed that the claimants had requested PLSB to amend the payment terms as set out in the PO dated 14 September 2015 to be consistent with the payment terms as set out in the e-mail dated 20 November 2015 issued by PLSB. By this email, the claimants repeated by reiterating their position that the contract is with PLSB and that the PO dated 1 December 2015 was issued to regulate the payment terms between the parties. Item 1 of the email dated 2 December 2015 provides as follows:

1.PLL: Present Order (attached) is to just regulate the immediate payment from PLL.

Ramo: Noted. Since **this order (PTIN17/411824) does not include GST, the implications of GST for SBMY01/38 should be adjusted in the subsequent RA bills raised by Ramo Industries Sdn Bhd.** (emphasis added)

[52] Subsequently PLL issued another PO dated 2 September 2016 to the first claimant containing the GST of 6% to correct the PO dated 1 December 2015 where the GST of 6% was missing covering now the balance of the

works. The adjudicator noted that it was also clear that the PO dated 2 September 2016 was issued to the first claimant by PLL to cater for the procurement of materials and such part of the services to be carried out by the first claimant which had GST implication.

[53] Premised on the above representation, confirmation and assurances with respect to the PO dated 14 September 2015 with PLSB forming the base order and that the subcontract shall be governed by the said order, the claimants are entitled to proceed peacefully and placidly that the subsequent PO dated 1 December 2015 and 2 September 2016 were what they were represented to be, which is to "regulate payment."

[54] The adjudicator did address his mind to the agreement entered into between PLL and the second claimant dated 30 August 2016 which was after the PO dated 1 December 2015 and before the PO dated 2 September 2016 and he took the cautious stand that against the backdrop of events that had transpired, that agreement cannot be looked at in isolation, without taking into account the prior and surrounding factual matrix of the whole contractual arrangement between the parties. See para. (m) at p. 16 of the adjudication decision.

[55] In para. (n) of p. 16 of the adjudication decision, the adjudicator set out documents both for and against the respective parties' stand on who is the real contracting party, ie, PLSB or PLL. He noted that the claimants issued their progress claims to PLL as with the requests for variation orders. I would say that by itself is not conclusive of a contract with PLL against the backdrop of the factual matrix of this case as demonstrated below.

[56] Regard must be had to para. 4 of the PO dated 14 September 2015 under "Notes To Supplier" where it is provided that the scope of works shall be as that directed by the "contractor" and in the PO, the term "contractor" referred to the "PLL-PLSB JV". Further under the general conditions of subcontract which forms part of the PO dated 14 September 2015, "contractor" was defined to mean "PLL-PLSB JV".

[57] The reply dated 20 October 2017 to the first claimant's application for extension of time ("EOT") dated 27 February 2017 was by PLSB as the letterhead was that of PLSB and clearly the words at the bottom left-hand corner of every page read "Joint Venture of Punj Lloyd Ltd" with the address in India stated. PLSB also set out their disagreement in the variation claims and notified the first claimant of their liquidated damages claim.

[58] The adjudicator very discernibly observed that it was anticipated, arising out of the above definitions of "contractor" in the relevant documents that certain instructions and documents would be issued by any component party of the "contractor" and the fact that there are documents issued by PLL or by PLSB, is not conclusively determinative of who is the actual contracting party. See p. 17 of the adjudication decision.

[59] Having considered all the above, I find that the adjudicator had more than sufficient basis for the purpose of the adjudication to proceed on the basis that the contract was between PLSB and the Ramo's JV, the material document being the "base order" which is the PO dated 14 September 2015 and the intention of the parties had not been varied by any express written documents or by definitive conduct of abandoning the "base order" or substituting it with subsequent POs which were all issued for the limited purpose of regulating payment.

[60] The reasoning and findings of the adjudicator for coming to his conclusion that there is a valid contract between PLSB and the Ramo's JV is reproduced below at paras. 12.3(h) and (l) of the corrective adjudication decision as follows:

> (h) Given the above, the evidence supports the Claimants' argument that PO dated 14.9.2015 remained the governing Subcontract between the Claimants and the Respondent for the subject works.
>
> ...
>
> (l) From the sequence of contractual arrangement, it appears to support the Claimant's argument that the PO dated 14.9.2015 was the actual base subcontract between the Claimants and the Respondent, whereas subsequent PO dates 1.12.2015 and PO dated 2.9.2016 were issued by PLL merely to regulate payment. The payment arrangement does not itself negate the very base subcontract under PO dated 14.9.2015 which was issued by the Respondent to the Claimants.

[61] I have no good reason to disagree with the adjudicator for the purpose of the adjudication. I therefore hold that the adjudicator had jurisdiction to hear the dispute before him as the parties before him were parties to the construction contract in writing.

Whether PLSB Is Estopped From Denying That The Contract Is Between Them And The Ramo's JV

[62] Learned counsel for the claimants submitted that PLSB is estopped from denying that it is the contracting party. As stated in cl. 2 of the PO dated 1 December 2015 provides that the said PO was issued by PLL to regulate payment. Implicit in that statement is that the said PO in no way derogates from the initial position confirmed in the PO dated 14 September 2015 issued by PLSB to the Ramo's JV.

[63] Even though this PO dated 1 December 2015 was short closed, the parties agreed in the agreement dated 30 August 2016 that the terms and conditions set out in the PO dated 1 December 2015 would apply and the subsequent PO dated 2 September 2016 made reference to the PO dated 1 December 2015 which again confirmed that the subsequent PO's issued by PLL were issued for the purpose to regulate the payment.

[64] PLSB made payment to the Ramo's JV in the sum of RM1.65 million. PLSB made this payment as there was a contract between the parties. Following the payment arrangement, PLL subsequently made the same payment to the Ramo's JV and so the Ramo's JV agreed to return to PLSB this amount. Therefore RISB prepared a cheque for the sum of RM1.65 million to PLSB. However, PLSB did not encash the cheque. Instead, PLSB instructed PLL to deduct the sum of RM1.65 million from the monies due to be paid to the Ramo's JV at that material time and PLL duly deducted the said sum of RM1.65 million. It would not be unreasonable to conclude that this position is consistent with the payment arrangement that had been entered into between the parties. Both PLSB being a joint-venture of PLL and PLL itself had no problem sorting out the payments between the two of them. In fact, the undertaking by RISB to pay back PLSB after having received this sum from PLL was given to PLL and not to PLSB.

[65] One cannot escape noticing that on the ground level where the progress of the works was conceded, there were numerous correspondence between PLSB with its address in Selangor covering the period from 16 December 2015 to 14 June 2017 as found at pp. 2712-2791 of exh. PC12 of PLSB's affidavit in support affirmed on 13 July 2018. The contents of the correspondence dealt with the whole gamut of the progress of the works, including variation orders.

[66] PLSB also claimed for liquidated damages in their letter to the RISB dated 20 October 2017 and this was claimed too by PLSB against the Ramo's JV in their adjudication response as highlighted by the adjudicator at para. 14.0 at p. 43 of the adjudication decision.

[67] It begs the question as to how PLSB can claim for liquidated damages against the Ramo's JV if not for the fact that PLSB had always acted consistently with their stand that they were the contracting party with the Ramo's JV and that the payment from PLL was their own internal arrangement with respect to regulating payments only.

[68] To cap it all, it was PLSB that issued the certificate of completion to the Ramo's JV at p. 2631 of exh. PC12 of PLSB's affidavit in support affirmed on 13 July 2018. The relevant parts of the certificate of completion on PLSB's letterhead reads:

> This is to certify that M/s Ramo Industries Pte Ltd, Singapore & M/s Ramo Industries Sdn Bhd has performed Pre-Engineering Structure and Pre-Fabricated Building for Accommodation Camp for tankage work at RAPID project Package -22, Pengarang, Johor, Malaysia.
>
> ...
>
> We hereby confirm that the job has been completed pursuant to the terms and conditions of the contract, applicable drawings, specifications & standards.

Their overall performance has been satisfactory.

Authorized Signatory

(Illegible)

For Punj Lloyd Ltd.
Joint Venture of
Punj Lloyd Ltd

[69] Learned counsel for PLSB submitted that this certificate of completion was issued by PLL but the letterhead is clear in that it is on that of PLSB though the name of the contractor is stated to be PLL.

[70] PLSB is thus estopped from contending that there is a valid and binding contract in the PO dated 14 September 2015 (SBMY01/38) issued by PLSB and that the subsequent purchase orders issued by PLL which have a joint venture with PLSB, are used for the purpose of regulating payment.

[71] Reference may be made to the decision of the Federal Court case in *Mohamed Ismail Mohamed Shariff v. Zain Azahari Zainal Abidin & Ors* [2013] 2 CLJ 717; [2013] 2 MLJ 605 at paras. [44] and [45] which state as follows:

> [44] The appellant himself had accepted the recommendations of the AA Report dated 3 October 1986 without qualification as evidenced by his own letter dated 7 October 1986 which stated:
>
> My dear En. Zain,
>
> I thank you for your letter dated 3 October 1986 together with a copy of the Report by Arthur Anderson & Co.
>
> I am glad to inform you that I accept the recommendations made therein and agree that the same be implemented upon the Report being accepted by all the other partners.
>
> With best regards.
>
> Yours Sincerely,
>
> SD
> MOHAMED ISMAIL
>
> [45] The appellant is therefore estopped from denying that he is bound by what he himself had agreed to (see *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank* [1995] 3 MLJ 331).

[72] Learned counsel for the claimants also referred to the Court of Appeal decision in *Mohd Bakri Ishak v. Universiti Utara Malaysia* [2015] 1 LNS 177; [2015] 4 MLJ 376 at paras. [11] until [13] as follows:

> [11] It was evident that while the letter of 26 July 2005 conveyed the consent or approval of the vice-chancellor, with conditions, the letter of 28 July 2005, as reproduced at para 7 above conveyed the decision of the university, without conditions.

A [12] We noted that the appellant's obligations under the first and the second agreements were to the university. The letter of 28 July 2005, conveying the decision of the university, therefore overrode the vice-chancellor's consent or approval conveyed in the letter of 26 July 2005.

[13] We observed that the letter of 26 July 2005 imposed the condition
B that the payment be made in one lump sum ('sekaligus'). If unable to comply, the appellant had the option of not accepting the appointment at Universiti Putra Malaysia. The letter of 28 July 2005 imposed no such impediment and allowed the appellant to proceed to accept his appointment. **In the event, estoppel would apply to estop the respondent from relying on the letter of 26 July 2005 and the first and the second**
C **agreements.** (emphasis added)

[73] This court must give some weight and take cognisance of the fact that PLSB is a joint venture of PLL and as joint-venturers, it is not uncommon for them to be jointly and severally liable for the projects they have undertaken. The conduct of the PLSB and PLL is such that where money
D matters are concerned, they seem to be able to sort it out between themselves as seen in the first payment of RM1.65m by PLSB but later agreed by PLSB that this sum by being set-off from payments that PLL would later be making direct to the claimants.

[74] In adjudication, one is concerned with the substantial justice of the
E case in that work done, in this case by the claimants has to be paid so that the contractor is not left high and dry.

[75] The subtleties and niceties can be left to the arbitration that PLL had commenced in India and meanwhile the adjudication decision has the effect
F of an interim finality. It is said that adjudication affords some kind of rough justice with the refined justice being had at the arbitration.

[76] Whilst this court is at liberty to look at the facts afresh where the issue of contingent jurisdiction is concerned, where it invariably will be encroaching into findings of facts of the adjudicator as in this case with
G respect to the finding on whether PLSB or PLL is the correct party to the contract and whether PLSB is nevertheless estopped from contending otherwise, this court would be slow to interfere with such a finding of fact necessary for a determination as to whether there is contingent jurisdiction on the part of the adjudicator to hear the dispute.

H **[77]** I have no good reason to dismiss the finding that PLSB is nevertheless estopped from arguing that they were not a party to the contract.

I

Whether PLSB Can In The Setting Aside Raise A New Argument That The Claimants Have Agreed That PLL Shall Be Liable For Payments And That PLSB Shall Be Discharged From All Obligations To Pay The Claimants Under s. 42 Of The Contracts Act 1950

[78] Section 42 of the Contracts Act 1950 states as follows:

> When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

[79] Learned counsel for PLSB then submitted that accepting for a moment that the contract was as found by the adjudicator which is one between PLSB and Ramo's JV, nevertheless this is a case where, by accepting payments from PLL, PLSB had been released of their obligation to pay under the contract.

[80] This argument under s. 42 of the Contracts Act 1950 was not taken up before the adjudicator and so the adjudicator cannot be faulted for not making a finding of mixed fact and law under s. 42 of the Contracts Act.

[81] The adjudicator had found as a matter of fact that monies are owing from PLSB to the claimants and not from PLL to the claimants.

[82] In a setting aside application under s. 15 of the CIPAA, the court has no business to interfere with findings of facts of an adjudicator unless it is a matter that goes to jurisdiction of the adjudicator in which case the court is at liberty to consider the evidence afresh and unfettered by what the adjudicator had held.

[83] However, this argument of whether there are monies due from PLL and not from PLSB is not a question of jurisdiction but a matter of pure finding of facts as to whether the circumstances under s. 42 of the Contracts Act 1950 apply. Have the claimants accepted performance of the promise to pay from PLL such that they can no longer enforce their contractual right to demand payment from PLSB?

[84] As can be seen, that question has nothing to do with the question of jurisdiction as it is premised on the finding of fact of the adjudicator that there was a contract between PLSB and the claimants. It is the question of whether there are any sums due from PLSB to the claimants or have the claimants agreed to look exclusively to PLL for payment and that they had discharged PLSB from all obligations to pay under the contract.

[85] The answer to that question would be a finding of mixed fact and law which this court would not interfere. Since it was not raised before the adjudicator, the adjudicator cannot be faulted for not making a specific finding of mixed fact and law under s. 42 of the Contracts Act 1950.

[86] Even going by the facts as found by the adjudicator, PLSB had not made out a case under s. 42 of the Contracts Act 1950. It is not in every case that merely because of some payment arrangements made by a promisor then a promisee is said to have released the promisor from its liability to pay. Otherwise, a promisor can always arrange for payments in the cheques from third parties or even a bank to make direct payments to the promisee and when there is default of payment, the promisor can always disclaim liability for payment!

[87] The court must always bear in mind what is the custom and trade of a particular industry and it is patently common in a construction contract for payments to be arranged by a contracting partner to come from its parent company or its employer up the chain of contracts or even as in this case, its joint venture partner. This is particularly so when, as in this case, PLSB by their letter is claiming for liquidated damages against the claimants and in the adjudication response, by way of the counter-claim and set-off seeking to set-off the liquidated damages from the claimants' payment claim. PLSB cannot blow hot and cold nor can they approbate and reprobate.

[88] As works were on-going, the concern of the promisee like the claimants in this case is not so much where the payment comes from in terms of the source of funds but that most importantly, the contract sum agreed is paid against progress claims which in this case constituted the payment claim.

[89] There was no finding from the adjudicator that this is a case where the claimants have discharged PLSB from their obligation to pay and had accepted that liability to pay rested with PLL.

[90] This is not a case where the claimants had agreed to look exclusively to PLL for payments for work done to the exclusion of PLSB. There is no novation of the contract nor a valid assignment of payments that the claimants had agreed with PLSB. The principle of privity of contract applies with full force in that only parties to the contract may sue each other under contract. Even if payments had come in reality from another entity in PLL, that, in the absence of a finding of fact of having assumed the legal obligation to pay under the contract, is merely a payment arrangement that PLSB is legally obliged to ensure that it is complied with and that the obligation of PLSB to pay still remains intact under the contract. It is nothing more than PLSB procuring by conduct that payment shall proceed from its joint venture partner in PLL.

[91] This is not a case where judgment had been entered against the judgment debtor and then the judgment creditor entered into an agreement with a third party introduced by the judgment debtor where payment is concerned as was the case in *Chinn Swee Onn v. Puchong Realty Sdn Bhd* [1990] 1 CLJ 28; [1990] 1 CLJ (Rep) 44; [1990] 1 MLJ 108 ("*Chinn Swee Onn*").

[92] Neither is this case where the promisee had accepted payment from a third party in place of the promisor as in *Hj Nik Ishak bin Hj Nik Daud v. Nik Zainab Nik Jaafar* [1975] 1 LNS 53; [1975] 2 MLJ 82 ("*Haji Nik Ishak*").

[93] In *Haji Nik Ishak,* the Federal Court had held that upon the promisee's acceptance of performance to pay from a third party, the promisor was discharged from any liability to pay the promise at p. 83B-83C as follows:

> However the more important question in this case is whether the respondent is liable for the balance of the purchase price, particularly the amount of $7,000. But for the agreement between the appellant and Nik Abdul Majid which is admitted, I would have no hesitation in giving an affirmative answer. The effect of the said agreement, it seems to me, is that upon the appellant's acceptance of Nik Abdul Majid's promise to pay or settle the amount of $7,000 the respondent was discharged from liability to pay.

[94] In the instant case, there was nothing to show that the claimants had accepted payment from PLL in substitution of payment by PLSB. All that the claimants were concerned is that payments shall be made for work done for PLSB and if PLSB or PLL were to tell them to direct the invoice to PLL they would gladly do so for purposes of "regulating payments".

[95] As to when s. 42 of the Contracts Act would apply would appear to be fact-sensitive and as the parties had not invited the adjudicator to look at the issue from that pleaded perspective, the adjudicator cannot be faulted for not making a specific finding of fact that s. 42 of the Contracts Act does not apply to the factual matrix. Suffice to say that this is a matter which this court in a setting aside application under s. 15 of the CIPAA would not be inclined to interfere.

[96] The Supreme Court case of *Chinn Swee Onn* can also be distinguished where it was held that a judgment creditor's agreement to receive payments from a third party towards a judgment debtor's debt would preclude the judgment creditor from enforcing its debts against the judgment debtor, at p. 110F-110H:

> We are of the view that the learned judge failed to give due regard to s. 42 of the Contracts Act 1950. The case of *LYL Hooker Sdn Bhd* [1987] 2 MLJ 52 referred to by the learned judge dealt with the question of novation and assignment. In that case, s. 42 of the Contracts Act 1950 was not in issue and hence was not considered by the High Court nor by the Federal Court. In the present appeal before us, counsel for the appellant relied strongly on s. 42 of the Contracts Act 1950 and *we agree with him that by virtue of the appellant's letter of 27 May 1985, the provisions of s. 42 applied and therefore the respondents having accepted the performance of the appellant's obligation to pay his debt to them by a third party, namely, Hock Hin Leong Sdn Bhd, the respondents were precluded from enforcing the judgment debt against the appellant.* The question of assignment and novation therefore did not arise in this case. In the circumstances, therefore, we held that the respondents were not, entitled to enforce the default judgments against

A the appellant. The consequential execution by way of bankruptcy notice and bankruptcy petition was bad and irregular. We accordingly allowed the appeal with costs and set aside the bankruptcy notice and the bankruptcy petition.

[97] The Supreme Court seemed to have been persuaded by the judgment B debtor wherein he had referred to the undertaking of the judgment creditor to forbear execution in consideration of payment from Hock Hin Leong Sdn Bhd as follows in his affidavit to set aside the bankruptcy notice at p. 107:

> I further say that the creditors took judgment in default against me in Ipoh High Court Civil Suit No 344 of 1983 and Ipoh Sessions Court Civil C Action No 701 of 1983 for a total of $102,392.50 on the mutual understanding and on the judgment creditors' undertaking that they will forbear to levy execution against me and in return I will instruct Hock Hin Leong Sdn Bhd of No 73 Jalan Leong Sin Nam, Ipoh to take over the judgment debt and forward to the judgment creditors the sum of $2,000 per month.
>
> D Relying on their aforesaid agreement and undertaking of the judgment creditors, I then authorised Hock Hin Leong Sdn Bhd to forward to the creditors the said sum of $2,000 per month. A copy of my letter dated 27 May 1985 addressed to Hock Hin Leong Sdn Bhd is now shown to me and marked 'CSO-1'. Since then the judgment creditors have accepted E payment from the said Hock Hin Leong Sdn Bhd but the total amount received by them is not known to me.

[98] The instant case is one where at most there was only an arrangement for payment or what was termed as "regulating payment" and the contract remained very much one between the claimants and PLSB and that PLSB had F not been discharged from their liability to pay. Mere payment from PLL does not excuse or absolve PLSB from payment under the contract. It is very much like a situation where the payment had come from the employer of the project direct to the claimants as subcontractors bypassing PLSB as contractor. If PLL does not pay, the claimants could still look to PLSB to G pay as their contractual commitment remained intact.

[99] It must be borne in mind that for s. 42 of the Contracts Act 1950 to apply, there must be actual performance by a third party of the promisor's obligation. If the third party had not fully performed the promisor's obligation, the promisee is not barred from pursuing against the promisor H merely because the third party had partially performed the obligation of the promisor in the absence of clear evidence that the promisee intends to discharge the promisor totally and look to the third party exclusively for the discharge of the promisor's obligation to pay for work done for the benefit of the promisor under the contract.

I

[100] Thus in *Scott & English (Malaysia) Sdn Bhd v. Foo Thor Lombong Bijih Sdn Bhd & Anor* [1984] 1 LNS 61; [1985] 1 MLJ 73 at p. 74 Abdul Razak J observed as follows:

> I think there was no doubt also that as the section [42] itself provided, there must be performance before the section can apply. Once performed, the promisee cannot go against the promisor.

[101] To the extent that the debt is irrecoverable against the promisor if the third party had performed the obligation to pay, it is nothing remarkable as a principle of law for it merely underscores the fact that the law would not allow a double recovery for that would be unjustly enriching the promisee.

[102] Based on the facts as presented, there is no room for the application of s. 42 of the Contracts Act 1950 discharging PLSB from their obligation to pay under the contract.

[103] In any event, PLSB cannot now canvass a new argument not taken up at the adjudication and more so when it is a matter that would need the underpinning of facts to be found by the adjudicator. The facts as currently found by the adjudicator does not support a s. 42 argument.

Whether The Adjudication Was With Respect To One Contract Or Two Separate Contracts

[104] Section 5 of the CIPAA has no prohibition on a payment claim arising from more than one single construction contract though the commonsensical approach consistent with the purpose of the Act to provide a mechanism for speedy dispute resolution through adjudication would be generally to have a payment claim that arises from one construction contract.

[105] Thus s. 5(1) provides as follows:

> An unpaid party may serve a payment claim on a non-paying party for payment pursuant to **a construction contract**. (emphasis added)

[106] "A construction contract" is different from "one construction contract" and the Bahasa Malaysia's translation is clear in that it is translated "suatu" for "a" and not "satu" as it would be for "one". To justify a construct of confining jurisdiction to only one construction contract based on the reference to "a construction contract" in s. 5(1) of the CIPAA would be to fail to appreciate the syntax in the sentence structure which does not stipulate specifically a single contract.

[107] What the CIPAA has in mind is an obligation for works under a unified contract that may well consist of a main contract varied by some variations made maybe in additional contracts and additional works added to the original works but all forming a single unified contract in a project.

[108] The English case of *Air Design (Kent) Ltd v. Deerglen (Jersey) Ltd* [2008] EWHC 3047 (TCC) addressed this issue when the argument was raised by the defendant that the adjudicator had no jurisdiction in a single adjudication to decide on disputes that arose under a number of subcontracts. Akenhead J had this to say at para. 2c as follows:

> The Supplementary Agreement is one which recognises in a way which has contractual effect that the parties were treating their contractual relationship as being in one "main contract". The total of the three sums agreed originally to be due with regard to the Basebuild, CPA and BMS Works are said to be a "a contract sum"; the variations are being treated as a single variation list to be addressed; maintenance and defects liability obligations are being treated as arising in effect as a unified obligation. It is this one "main contract" which is effectively being varied. Thus, **whatever the arrangement or arrangements contractually were before, as from Supplementary Agreement the parties clearly agreed to treat their contractual relationship as stemming from one contract.** (emphasis added)

[109] In the case of *Grovedeck Limited v. Capital Demolition Limited* [2000] BLR 181, the question that arose was whether the reference made in the UK 1996 Act to construction contract in the singular form, ie, 'a contract' or 'the contract', meant that a party could only refer a dispute from one construction contract. HHJ Bowsher explained at paras. 34-35 of the judgment as follows:

> Reading the [UK 1996] Act alone, I see nothing to prevent more than one contract being included in one referral. If there is to be any restriction on the number of contracts, or the number of disputes under one contract, to be referred, one has to look to the terms of the contract or the statutory scheme. But the restriction, if any, is to be derived from the contract or the statutory scheme. The statute is not to be construed by reference to the statutory instrument made under it. ... Section 108(2)(a) of the [UK 1996] Act requires that a construction contract shall "enable a party to give notice at any time of his intention to refer a dispute to adjudication" but I do not read that as showing any intention that the singular does not include the plural.

[110] Likewise in *Transmission Technology Sdn Bhd v. PESB Engineering Sdn Bhd & Another Case* [2018] 7 CLJ 516; [2018] MLJU 300 at paras. [12] to [17], following a commonsensical approach, it was observed as follows:

> [12] In the Plaintiff's submission to set aside the Adjudicator's decision, the following complaints were raised:
>
> (a) The Adjudicator had acted in excess of his jurisdiction, and
>
> (b) There was a denial of natural justice.
>
> [13] On the issue of excess of jurisdiction, the Plaintiff had contended that the Defendant's payment claim had been made with reference to the Plaintiff's letter dated 10.06.2015 as well as a letter of award dated 06.07.2015.

[14] As Section 5(1) of CIPAA had referred to "… a construction contract", the adjudicator had seemingly acted in excess of his jurisdiction by proceeding with an adjudication in respect of 2 contracts.

[15] Although 2 letters may have been in play, both had been in relation to the same project and referring to the same Works.

[16] The Defendant had referred to a book on *Construction Law* written by Julian Bailey where the following was quoted therefrom:

> Construction and engineering contracts are generally (ie, at common law) not required by Law to be in writing. Nor, if they were in writing, are they required to be signed. It is sufficient if the parties have conducted themselves as if their relationship was governed by particular terms and conditions. Nor, should the parties choose to enter into a written contract, are the parties required to embody all of the contract terms in a single document. Terms may be contained in a number of documents which, taken together, constitute the agreement between the parties.

[17] I would tend to agree that a broader view needs to be taken, especially if parties had seemed to know what they were talking about in the adjudication process, where no one appeared to be disadvantaged in any way. (emphasis added)

[111] I agree and accept the argument of learned counsel for the claimants that the binding contract between the parties is the PO dated 14 September 2015. The subsequent purchase orders were issued by PLL for the same and similar work as mentioned in the PO dated 14 September 2015. These POs were issued to "regulate payment". Very significantly, the contract amount mentioned in the subsequent purchase orders issued by PLL is same as the contract sum mentioned in the PO dated 14 September 2015 issued by PLSB.

[112] For the record, learned counsel for PLSB had argued that the PLL PO dated 1 December 2015 is between PLL and RIPL and the second construction contract is between the PLL and RISB under PLL PO dated 2 September 2016.

[113] Applying the above legal principle, the valid and governing subcontract is the PO dated 14 September 2015 issued by PLSB. Therefore, since the subsequent purchase orders issued by PLL are for the same and similar work as mentioned in the PO dated 14 September 2015, it stands to reason that it should be taken together to constitute a singular agreement as in a unified contract between the parties.

[114] Given that the PO dated 14 September 2015 is the governing of base subcontract as agreed between the parties, there are no two different contracts with two different parties as alleged by PLSB.

[115] Thus the adjudicator had jurisdiction to decide the disputes arising from the construction contract referred to.

Whether There Should Be A Stay Of The Adjudication Decision Pending Disposal Of The Arbitration That Has Been Commenced In India

[116] The stay application made by the respondent PLSB was made. It was pointed out by learned counsel for the respondent PLSB that the threshold condition to be satisfied need not be confined to a case where PLSB themselves are involved in a pending arbitration with the claimants. It would be sufficient if the arbitration that has been commenced deals with the same dispute or subject matter as in the adjudication and perhaps even in a more complete and holistic sense.

[117] Section 16(1) of the CIPAA on stay of adjudication decision reads as follows:

> (1) A party may apply to the High Court for a stay of an adjudication decision in the following circumstances:
>
> (a) An application to set aside the adjudication decision under section 15 has been made; or
>
> (b) The **subject matter of the adjudication decision** is pending **final determination by arbitration** or the court. (emphasis added)

[118] The point is taken that for so long as the subject matter of the adjudication decision is pending final determination, as it is here in the arbitration that has been commenced, it does not quite matter if the claimant there is PLL as it is and not PLSB; the subject matter is the same.

[119] To hold otherwise would be unfair to PLL that has taken the stand that the contract is between them and the Ramo's JV and not that between PLSB and the Ramo's JV. Neither would it be reasonable to force PLL to join PLSB as a party to the arbitration if PLL is not minded to for any strategic reasons or otherwise. Therefore, the fact that PLL was not a party to the adjudication is no bar for PLSB, a joint venture company of PLL, not being a party in the arbitration in India, to seek a stay of the adjudication decision provided there are special circumstances justifying the stay.

[120] Having held that the threshold condition has been met in that there is a pending arbitration on the subject matter of the adjudication decision, the next question is whether there are any special circumstances that would justify a stay of the corrective adjudication decision dated 2 July 2018.

[121] The court must hold as it were, in a dynamic balance, on the one hand s. 13(c) of the CIPAA which declares the adjudication decision to be binding until the dispute is finally decided by arbitration and, on the other hand, an unconditional or conditional stay under s. 16(1)(b) and (2) of the CIPAA.

[122] Section 16(2) reads as follows:

> The High Court may grant a stay of the adjudication decision or order the Adjudicated Amount or part of it to be deposited with the Director of the KLRCA or make any other order as it thinks fit.

[123] The two principles are not irreconcilable but rather consistent with the concept of adjudication which yield a result of interim finality until the final solution in arbitration or litigation. If every adjudication decision has to be stayed the moment there is a pending arbitration or litigation of the subject matter of the adjudication decision, then adjudication designed to facilitate the much-needed cash flow in the construction industry would be stifled and stymied. Inherent in the concept of quick adjudication is that prompt payment should be made to contractors who are already out of pocket for work done, lest they be driven to the brink of bankruptcy or suffer liquidation.

[124] Conversely, if adjudication decision cannot be stayed in whole or in part, conditionally or unconditionally, then in a case where there is an obvious or unequivocal error on the part of the adjudicator, the unsuccessful respondent would still have to pay first and argue later, and more so when the claimant is in a dire financial position where it may be reasonable to conclude that they would not be in a position to pay back should the respondent succeed in the arbitration.

[125] Learned counsel for PLSB referred to a host of English and Australian authorities where courts have granted either a stay of enforcement of an adjudication decision or an injunction restraining enforcement of adjudication decision, where the party resisting enforcement has shown reasonable prospect in its defence, error in the adjudication decision, or where the jurisdiction of the adjudicator is in question. They are as follows:

(i) *Pegram Shopfitters Ltd v. Tally Weijl (UK) Ltd* [2003] EWCA Civ 1750 English Court of Appeal:

(a) The claimant, Tally obtained an adjudication decision in its favour and sought to enforce the same against the defendant, Pegram.

(b) Pegram disputed the adjudicator's decision on the basis that there was no contract based on the claimant's standard terms or alternatively, there was no contract at all.

(c) The adjudicator proceeded on the premise that both parties agreed that their relationship was governed by a construction contract. The defendant's alternative argument of absolute absence of contract was disregarded by both the High Court and the adjudicator.

(d) The Court of Appeal found that the defendant had advanced a properly arguable jurisdictional objection with a realistic prospect of success. As such, the court refused to allow enforcement of the adjudication decision (at headnote, pp. 593-594).

(ii) *Dacy Building Services Ltd v. IDM Properties LLP* [2016] 170 Con LR 176 English High Court:

(a) The claimant, Dacy applied to enforce an adjudication decision that was made in its favour against the defendant, IDM. IDM contested the jurisdiction of the adjudicator, on the basis that Dacy's contract was with HOC, and not IDM.

(b) The High Court found that evidence of what happened after the contract would be relevant to test the credibility of the parties' cases. However, there was conflicting evidence as to what occurred after the contract as the emails and the letters from either party showed little or no consistency.

(c) As the question of who the claimant contracted with would turn on the facts and the evidence, the court held at para. 67 at p. 190 that defendant therefore had a realistic prospect of succeeding in its defence that it did not have a contract with the claimant. As such, the High Court refused enforcement of the adjudication decision. See also headnote (3).

(iii) *Filadelfia Projects Pty Ltd v. Entirity Business Services Pty Ltd* [2010] NSWSC 473, Supreme Court of New South Wales:

(a) The plaintiff, Filadelfia applied for an injunction to restrain the defendant, Entirity from enforcing an adjudication determination which was issued in Entirity's favour.

(b) Filadelfia's contention was that there was no construction contract between Filadelfia and Entirity, and that the actual construction contract was actually between Entirity and Zebicon.

(c) The court found that there is a serious question to be tried as to whether there was in existence a construction contract between Filadelfia and Entirity (para. 7)

(d) As the issue of existence of a contract is a basic and essential requirement for the existence of a valid adjudication determination, the court held that it is not constrained by the adjudicator's finding (para. 7).

(e) The court then granted an interim injunction restraining Entirity from enforcing the adjudication decision (para. 10).

(iv) *John Mowlem & Co Plc v. Hydra-Tight & Co Plc* [2000] Lexis Citation 1299, English High Court:

(a) The defendant, Hydra-Tight commenced adjudication action against the plaintiff, Mowlem. On Mowlem's application, the Institution of Civil Engineers appointed an adjudicator.

(b) Hydra-Tight argued that the Institution of Civil Engineers did not have jurisdiction to act, and applied for an injunction. The court found in favour of Mowlem.

(c) The court then granted an injunction restraining Hydra-Tight from taking any substantive step in the adjudication or seeking to enforce or implement any decision which the appointed adjudicator may make, at p. 10.

(v) *Abacus Funds Management Ltd v. Davenport* [2003] NSWSC 935, Supreme Court of New South Wales:

(a) Abacus engaged a contractor to carry out construction work on its premises. The contractor commenced an adjudication claim against Abacus.

(b) The adjudication determination was delivered in favour of the contractor and Abacus sought an injunction restraining the contractor to enforce the determination.

(c) Abacus submitted that there was an arguable case that there was an error of law in the adjudication determination. The court granted an interlocutory injunction restraining the contractor from seeking and enforcing an adjudication determination pending an application for an order quashing the adjudicator's determination (para 39).

(vi) *BRB Modular Pty Ltd v. AWX Constructions Pty Ltd & Ors* [2015] QSC 222, Supreme Court of Queensland:

(a) AWX sought an interlocutory injunction restraining BRB from enforcing the adjudicator's decision. AWX's contention was that the adjudicator lacked jurisdiction as the payment claim was issued before the relevant "reference date" under the adjudication legislation (p. 4 line 10-15).

(b) The court held that there is a *prima facie* case that the adjudication decision is void for jurisdictional error. As such, the court found that it is an appropriate case for the injunction to be granted (p. 13 line 25 and 40).

[126] Learned counsel for PLSB submitted that the special circumstances as required in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1; [2004] 1 MLJ 257, 257 at E and G are as follows:

(i) If PLSB is forced to pay the claimants, then any award in the Indian arbitration will be rendered nugatory as the claimants would have indirectly circumvented the requirement to bring all disputes covered by the arbitration clause between the claimants and PLL in arbitration for adjudication by proceeding with adjudication against a non-party to the arbitration agreement ie, PLSB;

(ii) Further, PLSB would not be able to recover any monies paid out to the claimants under the corrective adjudication decision in the event that the Indian arbitral tribunal should decide that the claimants are not entitled to their claim;

(iii) On the other hand, the claimants may still ventilate their substantive case in the Indian arbitration proceedings and the learned Indian arbitrator may decide in their favour. Hence, the claimants' claim in relation to the works is not prejudiced by the Indian arbitration proceedings.

[127] The fears are not justified. There is nothing preventing PLSB from commencing a civil suit against the claimants for a declaration that the contract in question is one between PLL and the claimants and not between PLSB and the claimants. However, the claimants may prefer to wait for the conclusion of the arbitration in India before commencing this civil suit to avoid two different tribunals coming to two different decisions.

[128] There is further nothing preventing this court from ordering a conditional stay subject to terms which terms would include an order that the claimants shall refund the adjudicated amount to PLSB or so much of it as may be found by the Indian Arbitral Tribunal as being paid for work done under the project which should have been duly paid by PLL and not by PLSB or that the net result is that there is nothing due from PLSB or PLL but that instead the claimants are to pay PLL.

[129] The submission of learned counsel for PLSB that the arbitral tribunal in the Indian arbitration has made a positive finding that the work under the contract executed by the claimants was issued by PLL in the interim award dated 28 July 2018 is no longer true as the interim award restraining the claimants from enforcing the corrective adjudication decision had subsequent to the filing of the submissions, been set aside by the Indian High Court.

[130] The Federal Court in *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479; [2018] 2 MLJ 22 sought to achieve a balance in the competing interests of the claimant and the respondent in an adjudication decision in this wise:

> [82] We are in agreement with the contention of the appellant that a more liberal reading of s 16 of the CIPAA would allow some degree of flexibility to the courts to stay the award where there are clear errors, or to meet the justice of the individual case. **It is accepted that a stay of the award ought not to be given readily and caution must be exercised when doing so** … (emphasis added)

[131] Looking at the financial position of the claimants, there is some evidence of some tight cash flow where the claimants are concerned as indicated in tab 8 of respondent's core BOD where payment had to come from PLSB to ease the cash flow of the claimants.

[132] The claimants' financial position in 2017 showed that they were slightly positive in terms of net assets over liability. Bearing in mind the fact that one of the Ramo's JV is a Singapore company and not a local Malaysian company, this is a case where since the subject matter of the dispute is already in arbitration in India, this court would grant a conditional stay. The conditions are:

(i) That half of the whole adjudicated amount inclusive of interest, fees, costs and expenses that had been ordered in the adjudication decision be paid to the claimants direct against the claimants' undertaking to pay the respondent back in the event that the arbitral award in India requires this sum paid to the claimants to be repaid back to PLSB/PLL or so much of it;

This undertaking shall carry a committal penal clause setting out the names of all the directors of the Ramo's JV;

The above sum shall be paid within three weeks from the date of this order.

(ii) The balance 50% shall be paid to the respondent PLSB's solicitors within three weeks of this order as stakeholders pending the outcome of the arbitral award in India.

[133] In the light of the above stay of the adjudication decision subject to terms, the enforcement order is on half or 50% of the adjudication amount as above-stated and the balance being stayed subject to the above conditions for stay being met within the stipulated time.

[134] As for costs for the setting aside application, I had allowed RM10,000 to the claimants and for the stay application another RM5,000 to the claimants and finally for the enforcement application, a sum of RM5,000 to the claimants as costs.